Supreme Court, U.S.
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No. 98-994

In The

Supreme Court of the United States

October Term, 1998

SAMMY'S OF MOBILE, ET AL.,

Petitioners,

v.

CITY OF MOBILE, ALABAMA,

Respondent.

On Petition For Writ Of Certoriari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-QUESTION PRESENTED FOR REVIEW

Respondent disagrees with Petitioners' Questions Presented for Review. The sole question presented for review is whether this Court should exercise its discretion to grant the Petition, when the Petitioner has not shown that the Court of Appeals has decided an important question of law in conflict with relevant decisions of this Court or other Courts of Appeal.

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STATEMENT OF THE CASE

Respondent disagrees with Petitioners' Statement of the Case to the extent that it is argumentative and contains facts immaterial to the question presented for review.

A. Statement of Facts.

On February 6, 1996, the Mobile City Council adopted Ordinance 03-003, which bans adult entertainment, including nude or topless female dancing, in establishments licensed to sell alcoholic beverages. The Ordinance provides:

> It shall be unlawful for any manager, officer, agent, servant, employee, or person in charge of any establishment within the City of Mobile or the police jurisdiction thereof, licensed to sell spiritous or vinous liquors or malt or brewed beverages under the law of the State of Alabama, knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof.[1]

---

[1] The Ordinance defines "nudity" as:

> [T]he showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the darkened area surrounding the nipple, or the depiction of covered male genitals in a discernably turgid state.

The preamble to the Ordinance provides:

> WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.
>
> WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spiritous or vinous liquor or malt or brewed beverages.
>
> NOW, THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama.

City of Mobile, Ala. Ord. 03-003.

At the time the Ordinance was adopted, the Petitioners were licensed to sell alcoholic beverages and offered topless female dancing on their premises. The Petitioners Sammy's of Mobile, Ltd., and Sammy's Management Company, Inc. (collectively referenced as "Sammy's") thereafter surrendered their liquor license and continued to offer female topless, as well as totally nude, dancing. The Petitioners J & B Social Club #1, doing business as "The Candy Store" and its owner Jennifer Bodiford (collectively referenced as "The Candy Store") did not surrender their license and continues to provide topless dancing. City officials have expressed an intent to enforce the ordinance against bars offering

topless female dancing, nothing more. (Pet'rs Appendix to Pet. for Writ of Cert. ("App.") 39a and 63a).[2]

B. Course of Proceedings and Dispositions in the Courts Below.

The Petitioners filed two separate actions against the City of Mobile ("City") arising out of the February 6, 1996 enactment of City Ordinance 03-003 ("Ordinance").

I. Petitioner Sammy's.

On February 22, 1996, Sammy's filed a complaint and a motion for a temporary restraining order against the City in state court. Sammy's alleged, *inter alia*, that the Ordinance violated its protections under First Amendment to the United States Constitution.

On February 26, 1996, the case was removed to the United States District Court for the Southern District of Alabama pursuant to 28 U.S.C. § 1441. The District Court heard Sammy's motion on February 29, 1996. (App. 66a). On March 6, 1996, the District Court denied Sammy's motion. *Sammy's of Mobile, Ltd. v. City of Mobile*, 928 F.Supp. 1116 (S.D.Ala. 1996) (App. pp. 65a-76a).

---

[2] The case at bar arose in the context of a pre-enforcement challenge. Mobile has repeatedly stated it only intends to enforce the ordinance against topless bars. Accordingly, the District Court declined to consider an overbreadth challenge because it is not yet ripe, citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 n.1 (1982) and *Poe v. Ullman*, 367 U.S. 497 (1961).

II. Petitioner The Candy Store.

On March 12, 1996, The Candy Store filed a complaint and a motion for injunctive relief in the District Court. This complaint likewise alleged, *inter alia*, that the Ordinance violates the First Amendment.

The District Court held a hearing on The Candy Store's injunctive motion on March 19 and 20, 1996. (App. p. 54a). On March 26, 1996, the District Court denied The Candy Store's motion for injunctive relief. *J & B Social Club, #1, Inc. v. City of Mobile*, 920 F.Supp. 1241 (S.D.Ala. 1996) (App. 53a-64a).

III. Consolidated Cases.

The District Court consolidated the two cases without objection on April 23, 1996.

On August 12, 1996, the Petitioners and Respondent informed the District Court that only questions of law were at issue, that no material fact disputes existed, and the cases were amenable to summary judgment. (App. 37a). Motions for summary judgment and responses were filed by all parties, and following oral argument the District Court granted the City's motion for summary judgment and entered a final judgment thereon upholding the Ordinance. *J & B Social Club #1, Inc. v. City of Mobile*, 966 F.Supp. 1131 (S.D.Ala. 1996) (App. 35a-52a).

The Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit. On May 8, 1998, the Court of Appeals affirmed the judgment of the District Court. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998) (App. 1a-34a).

On May 20, 1998, the Petitioners petitioned for rehearing *en banc* by the Court of Appeals. The Court of Appeals denied Petitioners' request for rehearing. 156 F.3d 188 (App. 77a).

C. The District Court's Opinions.

In denying the Petitioners injunctive relief, the District Court followed *California v. LaRue*, 409 U.S. 109 (1972) and its progeny. (App. pp. 65a-76a). Within that line of cases, the Court stated that the Twenty-first Amendment provided any such regulation an added presumption in favor of its validity. *LaRue*, at 118-119.

Prior to the District Court's consideration of summary judgment motions, the Court rendered its decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In light of the *44 Liquormart* opinion, the District Court concluded the Twenty-first Amendment no longer provides an "added presumption" in favor of the validity of state liquor regulations. The District Court observed that, while the Court in *44 Liquormart* rejected the idea that the Twenty-first Amendment "trumps" the First Amendment in the area of liquor regulation, the Court in *44 Liquormart* upheld *LaRue* and its progeny and provided a "roadmap" for upholding state regulations of adult entertainment in bars. Specifically, the Court cited two cases which validated state regulation of adult entertainment without the presence of alcohol being an issue. *44 Liquormart*, 517 U.S. 484, 515 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding a zoning ordinance separating "adult" theaters from residential neighborhoods and churches) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560

(1991) (upholding an Indiana public indecency statute which applied in the context of barroom topless female dancing)).

The District Court applied the *Barnes* analysis, first developed in *U.S. v. O'Brien*, 391 U.S. 367 (1968). This four-part test provides that expressive conduct can be validly regulated if (1) the regulation is a legitimate exercise of authority, (2) furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the restriction of First Amendment rights is no greater than necessary to further the government's interest. *Id.*

The petitioners primarily take issue with the District Court rulings that the Mobile ordinance satisfies the second and third prongs of the *Barnes* analysis. The petitioners argue that Mobile must come forth with empirical evidence of "adverse secondary effects" prior to regulating adult entertainment in a barroom atmosphere; otherwise, petitioners contend the regulation is related to the suppression of free speech, or content-based.

Both the District Court and the Eleventh Circuit rejected this argument. The District Court, citing Justice Souter's *Barnes* concurrence, held there is no constitutional requirement that the City make particularized findings regarding adverse secondary effects. The District Court found the City had a "reasonable basis" for believing the ordinance will serve its substantial governmental interest grounded in the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as the city's own wisdom and common

sense. *J & B Social Club #1, Inc. v. City of Mobile*, 966 F.Supp. at 1138. (App. 47a).

D. The Eleventh Circuit's Opinion.

The Eleventh Circuit affirmed the District Court's judgment. *Sammy's of Mobile v. City of Mobile*, 140 F.3d 993 (*see* App. 1a-34a).

The Eleventh Circuit initially noted the Court's validation of regulations, such as Mobile's, in *LaRue, New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981) and *City of Newport v. Iacobucci*, 479 U.S. 1047 (1987), and observed in *44 Liquormart*, the Court reaffirmed the precedential value of *LaRue*, as well as the *Barnes-O'Brien* test. The Eleventh Circuit recognized the Court's explanation that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations," and, even after *44 Liquormart*, *LaRue* "would come out the same way." *44 Liquormart*, 517 U.S. at 515.

The Eleventh Circuit applied the *Barnes-O'Brien* test and agreed with the District Court that the Mobile ordinance was a constitutionally permitted regulation of expressive conduct.

The Court of Appeals rejected the petitioners' claim that the lack of empirical evidence invalidates the ordinance, finding that Mobile had a "reasonable basis" for believing that its ordinance will serve the substantial governmental interest in avoiding the adverse secondary effects of "nudity and sexually explicit entertainment coupled with alcohol in public places." 140 F.3d at 997. The

Eleventh Circuit assessed the City's basis for the regulation as reasonable and sufficient in that Mobile relied upon the "experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense." *Id.* Under *Barnes* there is not a requirement that a city make particularized findings regarding adverse effects of the combination of alcohol and nude entertainment, and the Court of Appeals considered this Court's observation in *Bellanca* that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718.

The Eleventh Circuit majority dismissed the petitioners' argument that the Mobile ordinance is "content-based," as a conclusion clearly departing from prior cases holding that regulations such as Mobile's are not aimed at the erotic message of nude dancing, but the adverse secondary effects arising from the combination of alcohol and nude dancing. The Court of Appeals rejected equating *reference* to content with content *suppression*, and applied the *Barnes-O'Brien* intermediate level of scrutiny for regulations which distinguish between nude and clothed entertainment.

The Eleventh Circuit correctly observed that Mobile defends its ordinance as an attempt to combat the secondary effects of nude performance in a barroom atmosphere and concluded that the Mobile ordinance does not seek to ban whatever message is conveyed by nude dancing, or even to ban nude dancing. Indeed, the petitioner Sammy's may, and has since the ordinance was adopted, offer completely nude dancing without the sale of alcohol.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS CORRECT AND NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS.

(1)

The instant case is one of first impression among the circuits. The Eleventh Circuit is the first United States Court of Appeals to consider a governmental regulation of adult entertainment in liquor-licensed establishments since the determination in *44 Liquormart* that such regulations no longer have an added presumption of validity. As such, the Court should not grant the instant petition for a writ of certiorari.[3]

The Court has long upheld regulations prohibiting nude dancers in licensed liquor establishments. *LaRue*, 409 U.S. 109, *Bellanca*, 452 U.S. 714, *City of Newport*, 479 U.S. 92. In *44 Liquormart*, the Court stated that *LaRue* used the Twenty-first Amendment as merely a "buttress" to the conclusion that the First Amendment did not invalidate prohibiting sexual exhibitions in premises licensed to serve alcoholic beverages. 517 U.S. at 515-16. In making those comments, the Court forestalled the view that

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[3] In denying a petition for writ of certiorari, Justice Frankfurter issued an opinion, stating:

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Maryland v. Baltimore Radio Show, 388 U.S. 912, 918 (1950).

44 Liquormart was the death knell for prohibiting nude entertainment in bars. By stating that *LaRue* "would come out the same way," in *44 Liquormart*, the Supreme Court also reaffirmed, by citing *Barnes-O'Brien*, that the intermediate level of scrutiny applies to the prohibition of nudity in liquor license establishments rather than the strict scrutiny test advocated by the petitioners.

(2)

The preamble to Mobile's ordinance specifies that the Mobile City Council found that "nudity and sexual conduct . . . , coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare." As such, the City Council enacted the ordinance prohibiting this mixture to avoid the disturbances associated therewith. The stated purposes of the ordinance combine elements of combating adverse secondary effects as well as protecting societal order and morality, with only an incidental impact on expressive conduct. Accordingly, the ordinance is content-neutral. *See Barnes*, 501 U.S. at 567-68 (plurality opinion) and 501 U.S. at 582 (Souter, J., concurring in the judgment).

The petitioners misplace reliance on *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), for the proposition that the Mobile ordinance unconstitutionally conditions the conferral of a benefit (a liquor license) on the surrender of a constitutional right (the right to dance nude). The Court rejected this contention in *Barnes*, finding that regulations affecting adult entertainment are constitutional if they satisfy the *O'Brien* analysis. 501 U.S. at 566-67 (plurality

opinion); 501 U.S. at 582 (Souter, J., concurring). The Court has not recognized a fundamental right to unrestrained nude dancing in all settings. *Cf. Young v. American Mini Theatres*, 427 U.S. 50, 79 n. 2 (1976) (Powell, J., concurring) ("The communication involved here [adult movies] is not a kind in which the content or effectiveness of the message depends in some measure upon where or how it is conveyed.").

Further, the petitioners confuse the Court's analysis in commercial speech cases with the content-neutral test for regulations of adult entertainment which incidently affect expressive *conduct*. (Pet. at 27). In *44 Liquormart*, the Court clarified that either the *American Mini Theatres* "time, place and manner" analysis or the *Barnes-O'Brien* test is utilized in considering prohibitions of topless dancing in places where alcohol is served. 517 U.S. at 515. The Court noted, "LaRue did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Id.*, at 515-16 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n. 2 (1995)).

The Mobile ordinance is a content-neutral prohibition of adult entertainment in places where alcohol is served. The Eleventh Circuit properly subjected the ordinance to the *O'Brien* intermediate level of scrutiny set forth in *Barnes*.[4]

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[4] In *Barnes*, the Court observed that its analysis of "time, place, or manner" regulations of adult entertainment, most recently applied in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), embodies much the same standards as those set forth in *O'Brien*. *Barnes*, 501 U.S. at 566 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

(3)

The petitioners incorrectly argue, based in large part on their lengthy citation to the Eleventh Circuit's dissent, that the third prong of the *Barnes-O'Brien* test (governmental interest is unrelated to the suppression of free expression) was not satisfied by Mobile's ordinance. The petitioners contend that Mobile's ordinance fails to satisfy this element which subjects the ordinance to the "searching" level of scrutiny applied to content-based laws. Thus, the petitioners' argument goes, the Eleventh Circuit's opinion conflicts with the decisions of the Court.

The Eleventh Circuit held that the Mobile ordinance satisfies the third part of the *Barnes-O'Brien* analysis and ruled the important or substantial governmental interest set forth in the preamble to the ordinance is unrelated to the suppression of free expression. This ruling does not conflict with the decisions of this Court.

On its face, the ordinance is aimed at combating the adverse secondary effects of the mixture of adult entertainment and the sale of alcohol by the drink, which is not at all inherently related to expression. *See Barnes*, 501 U.S. at 585 (Souter, J., concurring). The City's "secondary effects" justification indicates that enforcement of the ordinance against nude dancing in bars is "justified without reference to the content of the regulated [expression]." *Id.*, at 586 (quoting *Renton*, 475 U.S. at 48).

The claim in *Barnes*, as in the instant case, was that the proscription was unconstitutional as applied to nude dancing. The plurality concluded, "[i]t was not the dancing that was prohibited, but simply its being done in the nude." *Barnes*, 501 U.S. at 571. In the instant case, Mobile

"has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [topless dancing]." *American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring). The ordinance is addressed only to the places at which this type of expression may be presented, specifically not at those places where alcohol is served, a restriction that does not interfere with content. If Mobile had been concerned with the message purveyed by topless dancing establishments, it would have prohibited them rather than only proscribing topless dancing in a barroom atmosphere. Yet, no party disputes that Sammy's, having surrendered its liquor license, can present topless or completely nude dancing without violating the ordinance. The Eleventh Circuit correctly concluded that "Mobile is attempting only to regulate the sale of alcohol in inappropriate places and it has determined that it is inappropriately sold in places where nude dancing is offered." (App. 10a).

The Mobile ordinance is not intended to suppress the message of nude dancing, or the primary effects of "offensive speech," but rather the negative secondary effects concomitant with the consumption of liquor in such situations. *Cf. Reno v. Am. Civil Liberties Union*, ___ U.S. ___, 117 S.Ct. 2329, 2342 (1997) (purpose of Communications Decency Act of 1996 was "to protect children from the *primary* effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech" thus Act was content-based (emphasis added)).

The Eleventh Circuit's holding that the Mobile ordinance is unrelated to the suppression of free expression complies with the Court's jurisprudence.

(4)

The Eleventh Circuit found that the Mobile ordinance satisfies the second *Barnes-O'Brien* prong because it furthers an important or substantial governmental interest. In so holding, the Court of Appeals determined that Mobile had a "reasonable basis" for believing its ordinance will serve its substantial governmental interest in avoiding the adverse secondary effects of "nudity and sexually explicit entertainment coupled with alcohol in public places." (App. 7a). The Eleventh Circuit located this reasonable basis "in the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense." (*Id.*).

Petitioners claim the Eleventh Circuit's conclusion conflicts with the decisions of other circuits. The petitioners contend there is a "dramatic" split among the circuits on the issue of the necessity for governmental entities to establish and support a "legitimate or substantial governmental objective" when enacting legislation prohibiting nudity in bars. (Pet. 24).

The petitioners' contention is unfounded. Quite simply, the directly controlling precedent in the instant case is *Barnes* and *LaRue*. Further, the decisions from several circuits, cited by petitioners, do not conflict with the holding in the instant case and do not contradict the Court's holdings in *Barnes* and *LaRue*. Accordingly, no

conflict exists, either among the circuits or with the Court.

The Eleventh Circuit correctly assessed that the Mobile ordinance is aimed at the very type of harm found to create a substantial government interest in *LaRue* and *Barnes*. (App. 7a). In *LaRue*, the Court found rational the state's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur . . . " 409 U.S. at 118. In this respect, as the Fourth Circuit recently noted, the Court considered that " '[p]rostitution occurred in and around [topless bars], and involved some of the female dancers' and that '[i]ndecent exposure to young girls, attempted rape, [and] rape itself' also were quite common around such establishments." *Steakhouse, Inc. v. City of Raleigh*, 1999 WL 22978 at *3, No. 97-2341 (4th Cir. Jan. 21, 1999) (quoting *LaRue*, 409 U.S. at 111) (recognized that "nude and topless barroom dancing have a long history of spawning deleterious effects [by] encourag[ing] prostitution and the criminal abuse and exploitation of young women").

Likewise, in *Barnes*, Justice Souter concluded that Indiana's public indecency statute, as applied to nude dancers, served an important governmental interest because such dancing "encourages prostitution, increases sexual assaults, and attracts other criminal activity." 501 U.S. at 582. The plurality determined the statute served Indiana's substantial governmental purpose "of protecting societal order and morality." *Id.* at 568. Again, individualized findings of actual statewide conditions were not present. *Id.* at 582 ("this justification has not been articulated by Indiana's legislature"). Instead, the Court relied on *Renton, American Mini Theatres* and *LaRue* as

citing the adverse secondary effects arising from adult entertainment, as well as the *post hoc* assertion of such adverse effects set forth in Indiana's brief. *Barnes*, at 582-584.

The petitioners argue that a conflict among the circuits exists concerning whether a governmental entity must affirmatively establish a factual basis, or provide evidence, to support its conclusion that important government interests are at stake, and the "motivation for adopting regulations, beyond the mere conclusions stated in the legislation itself." (Pet. 23). The Court has clearly foreclosed this question in *Barnes*. To the extent circuit court cases may have imposed a different requirement, they have been altered by *Barnes*. *See Marks v. United States*, 430 U.S. 188 (1977); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997) (recognizing pre-*Barnes* Sixth Circuit cases were altered by *Barnes* analysis).

Under the Court's opinions in *Barnes*, Mobile need not await localized proof of the secondary effects it seeks to alleviate. Further, the City is not required to come forward with empirical evidence to support its reasonable conclusions that a prohibition against nude dancing in bars serves its substantial governmental interests. As Justice Souter declared:

> Our appropriate focus is not an empirical inquiry into the actual *intent* of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.
>
> . . . .

> The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton, American Mini Theatres,* and *LaRue.* It is therefore no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects . . . . In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana *could reasonably conclude* that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's 'bookstore' *furthers* its interest in preventing prostitution, sexual assault, and associated crimes. . . . I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case. The statute *as applied* to nudity of the sort at issue here therefore satisfies the second prong of *O'Brien.*

Barnes, 501 U.S. at 582-584 (emphasis added).

Just as the State of Indiana could conclude that "the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of men predisposed to such activities, or from the simple viewing of nude bodies," *Barnes,* 501 U.S. at 586 (Souter, J., concurring), so too could the City of Mobile reasonably conclude that similar results obtain from similar concentrations of crowds in the barroom setting. In fact, Mobile's conclusion is even more reasonable in light of the Court's cases upholding such regulations. *LaRue,* 409 U.S. 109, *Bellanca,* 452 U.S. 714, *City of Newport,* 479 U.S. 92.

In *LaRue*, the Court catalogued the problems arising from liquor-licensed adult entertainment establishments. 409 U.S. at 111. From this, the Court concluded California had a rational basis for its conclusion that a regulation banning adult entertainment in places serving alcohol would further its interest in preventing "bacchanalian revelries." 409 U.S. at 118.

In *Bellanca*, the Court cited with approval the state's legislative memorandum, which is very similar to Mobile's preambulatory clause:

> Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand.

452 U.S. at 717. The Court noted that, if legislative findings were required to uphold the constitutionality of New York's statute banning topless dancing in bars, such findings were satisfied by the purposes set forth in the legislative memorandum. *Id.*

Finally, in *City of Newport*, the City, in its preamble, determined that nude dancing in establishments serving liquor was "injurious to the citizens" of the City. 479 U.S. at 96. The City found the ordinance necessary for a range of purposes, including "prevent[ing] blight and the deterioration of the City's neighborhoods" and "decreas[ing] the incidence of crime, disorderly conduct and juvenile delinquency." *Id.* at 96-97. The Court rejected the Sixth Circuit's conclusion, *Iacobucci v. City of Newport*, 785 F.2d 1354, 1359 (6th Cir. 1986), that "the preamble to the

ordinance, standing alone, is insufficient evidence of the motivating factors in its passage."

Mobile was entitled to rely on the experience and findings of other legislative bodies as a basis for its adoption of its ordinance. There is no reason to believe that the adverse secondary effects of topless dancing in Mobile bars is likely to be different than the effects of such topless dancing in California, New York or City of Newport, Kentucky bars. For that matter, Mobile could reasonably conclude that the negative secondary effects arising from the topless dancing bars in the City of Mobile are similar to the secondary effects arising from topless dancing establishments in Indiana (*Barnes)* or from the adult theaters in Detroit (*American Mini Theatres)* and in Renton, Washington. *See DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 411 (6th Cir. 1997).

Like the Eleventh Circuit, subsequent to *Barnes* and *Renton,* the Second, Fourth, Sixth, Eighth and Tenth Circuit Courts of Appeals have agreed that governmental entities are not required to produce empirical evidence relating to their interest in ameliorating adverse secondary effects arising from adult entertainment. *See Buzzetti v. City of New York,* 140 F.3d 134 (2d Cir.), *cert. denied,* ___ U.S. ___, 119 S.Ct. 54 (1998); *D.G. Restaurant Corp. v. City of Myrtle Beach,* 953 F.2d 140 (4th Cir. 1991); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1997); *Farkas v. Miller,* 151 F.3d 900 (8th Cir. 1998); *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683 (10th Cir.), *cert. denied,* ___ U.S. ___, 119 S.Ct. 162 (1998). Also, prior to *Barnes* and shortly before *Renton,* the Seventh Circuit ruled that a

government need not prove the existence of adverse secondary effects which its legislation is designed to avoid. *Cf. Wall Distrib., Inc. v. City of Newport News*, 782 F.2d 1165, 1169-70 (7th Cir. 1986).[5]

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[5] In upholding a restriction on adult entertainment establishments, with no prior evidence of illegal activity arising therefrom, the Seventh Circuit stated:

> In assessing the reasonableness of local [legislation] . . . , we may not confine the local legislature to only what it knows and can foresee from purely local conditions already experienced. Legislatures can no more be held bound not to know what the whole world knows than can courts; legislative notices of facts must be deemed to run at least as wide as does judicial notice.
>
> . . . .
>
> We therefore assess the reasonableness of the [city's] determination [to regulate adult-oriented businesses] not solely on the basis . . . of what had already demonstrably occurred within its geographical borders, but of what it might reasonably foresee in light of a sufficiently documented wider national experience properly reflected in matters of public record. It would defy common sense to suppose that the [city leaders] are not made aware in this day and time of comparable conditions in other localities, and of the varied responses being made by other local governments to conditions already experienced. We therefore assume that a proper factor in this local legislative determination of governmental interests was what was demonstrably being generally experienced in comparable localities. . . .
>
> To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would unrealistically

The cases cited by petitioners are distinguishable from the instant case; and, thus do not support petitioners' proposition that a conflict exists among the circuits. The Third, Fifth and Ninth Circuits have issued decisions, subsequent to *Renton* and *Barnes*, which impose a requirement on governmental entities to produce empirical evidence to justify a regulation of adult entertainment. The cases do not involve the regulation of topless dancing in establishments licensed to sell alcohol.

The Ninth Circuit, in *Acorn Invs. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), considered the City of Seattle's ordinance requiring "peepshows" to pay various license fees and to disclose the names and addresses of shareholders. The Ninth Circuit concluded that the City of Seattle failed to produce evidence that the "peepshows" produced adverse secondary effects and thus the city could not show that the licensing scheme furthered a substantial government interest. 887 F.2d at 222.

Acorn Invs. is distinguishable from the instant case. The Seattle ordinance was a licensing scheme, not a regulation of conduct. Further, it is important to note that this Court upheld the City of Renton, Washington's adult theater zoning regulation without particularized findings in the City of Renton, and recognized Renton's reliance on the experiences of Seattle with adverse secondary

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require deliberate subjection to those experiences and conditions before attempting to avoid them.

Wall Distrib., 782 F.2d at 1169-70 n. 7. *See also Postscript Enters. v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990) (adopting *Wall Distrib.*'s reasoning in upholding legislation restricting adult movie arcades).

effects of adult entertainment. *Renton*, 475 U.S. at 51-52. Apparently, the Ninth Circuit has required a showing of adverse secondary effects arising from each particular segment of the adult entertainment industry prior to combating those effects, demanding a showing that Seattle "peepshows" have negative effects on a community which has already found that adult theaters have such effects. The Ninth Circuit's ruling is contrary to the Court's holdings in *Barnes* and *Renton*.

The Third and Fifth Circuits found that, while no showing need be made concerning pre-enactment evidence of adverse secondary effects arising from adult entertainment, a city must produce *post hoc* evidence at trial to justify its regulation of adult entertainment. *Phillips v. Borough of Keyport*, 107 F.3d 164, 173-74 (3rd Cir. 1997) (involving an adult entertainment zoning ordinance) and *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998) (not cited by petitioners) (involving a ban on public nudity as applied to nude dancers).

The Third and Fifth Circuits are clearly in the minority, as set forth above. Moreover, and more importantly, the Third and Fifth Circuits did not consider a regulation of adult entertainment in a barroom atmosphere.

Consequently, no conflict exists among the circuits on the prerequisites for a municipality to enact a valid prohibition on topless barroom dancing. As stated above, the instant case is the first time this issue has been decided by a Court of Appeals since *44 Liquormart*. The decision of the Eleventh Circuit is consistent with the prior decisions

of the Court, and based on that precedent, the petitioners' First Amendment interests are not violated.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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* Admission Application to be filed